

Respondent argues the ALJ's Award should be affirmed.

The sole issue for Board determination is the nature and extent of claimant's functional impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ's Award sets out findings of fact and conclusions of law that are detailed, accurate and supported by the record. It is not necessary to repeat those findings and conclusions herein. The Board adopts the ALJ's findings and conclusions as its own as if specifically set forth herein except as hereinafter noted.

Highly summarized, on January 1, 2007, claimant was parked on the road's shoulder while working a vehicle accident. He was struck from behind by another vehicle and he suffered shooting pains going down his back and into his right leg. Claimant completed his work shift and then sought medical treatment at Gove County Medical Center's emergency room in Quinter, Kansas. X-rays were taken of his thoracic and lumbar spine which revealed mild wedging of the L1 vertebra. Claimant was treated with pain medication as well as physical therapy. Claimant continued to seek intermittent conservative treatment for approximately a year. MRI studies of claimant's cervical, thoracic and lumbar spine were performed. The MRI studies revealed diffuse mild degenerative changes in the low back. A referral to Dr. Timothy Burney was made due to claimant's continued complaints of back pain. The doctor prescribed some additional physical therapy, home traction and also a TENS unit.

Claimant continues to have back pain, spasms in his right buttock and numbness towards the outside of his right leg and into the big toe. In order for claimant to continue working, he takes prescription medication for pain and gets in and out of his car frequently so that his back doesn't get stiff. He also moves back and forth in his seat in order to stretch his back.

Claimant suffered a low back injury from being bucked off a horse when he was young. He also suffered another back injury while working a wreck in 1999. At that time claimant was helping lift a person onto a gurney when he felt a little pop in his lower back with pain shooting down into his left leg. An MRI showed degenerative change at L4-5. Claimant was treated with physical therapy and returned to work with no additional symptoms or problems. He later suffered another aggravation when he reached for his hat in the patrol car and felt some discomfort in his low back. He was treated by his primary care physician, Dr. Nemechek, and released to full duty.

Dr. Edward J. Prostic, board certified orthopedic surgeon, examined and evaluated claimant at his attorney's request. On May 4, 2009, Dr. Prostic took a history from claimant and performed a physical examination. Claimant's cervical spine showed some weakness and pain extending into the right elbow against resistance and no other neurologic abnormality was present. The thoracic and lumbar spine had tenderness at the midline of T6. Claimant also had pain while internally rotating the left hip in the flexed position. X-rays were taken of claimant's lumbar spine which revealed an old appearing compression deformity anteriorly at L1 as well as short pedicles at L5. The doctor opined the claimant's physical examination was consistent with the claimant's complaints of pain as well as the mechanism of his work-related injury. Dr. Prostic diagnosed the claimant with mild right L5 radiculopathy and residuals of injuries to his cervical and lumbar spine. The doctor did not recommend any additional medical treatment nor permanent restrictions. Based upon the *AMA Guides*¹, Dr. Prostic opined claimant has a 12 percent permanent partial functional impairment to his body as a whole. The doctor rated the claimant's lumbar spine at 10 percent and his cervical spine at 2 percent.

On cross-examination, Dr. Prostic explained his rating for the lumbar spine:

Q. Doctor, Dr. Stein has provided us a rating also and he was of the opinion that this is a case where you need to use the DRE Model. Could you highlight for us why you've elected not to use the DRE Model?

A. Well, there are two reasons. One is that subsequent writings of the AMA have said that if there's repetitious injury to the same area that the Range of Motion Model is the preferred method. The other is that on Page 99 the book gives permission to use either model and tells you that the one that is preferred is the one that is closer to the Range of Motion Model. So if look at Page 99, bottom paragraph on the left is some double speak AMA talk.

Q. On the left column?

A. Let me just check the book and make sure that I'm telling you the right thing. Yeah, it says, "If the physician cannot decide into which DRE category the patient belongs, the physician may refer to and use the Range of Motion Model." And then at the bottom of that paragraph it says, "The proper DRE category is the one having the impairment percent that is closest to the impairment percent determined with the Range of Motion Model." So what they're saying is the physician can use either

¹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

model, but the one that's most accurate is the one that lines up best with the Range of Motion Model.²

On October 15, 2009, Dr. Paul Stein, board certified in neurological surgery, performed an examination and evaluation of claimant at the request of the respondent's attorney. Based upon his examination, the doctor diagnosed claimant with a soft-tissue injury (sprain) to the mid and lower back. Dr. Stein opined that claimant did not need any additional treatment and therefore was at maximum medical improvement. Based on the *AMA Guides*, Dr. Stein opined claimant suffered a 5 percent permanent partial functional impairment to his body as whole which placed him in the DRE Category II. The doctor did not impose any permanent restrictions.

Dr. Stein further opined that the findings at L4-5 on the MRI scan were consistent with claimant's age and there was no disk herniation or nerve root compression. Claimant's physical examination reflected no neurological deficit consistent with the requirements of the *AMA Guides* for a DRE Category III or 10 percent impairment.

Functional impairment is defined by K.S.A. 44-510e(a), as follows:

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.³ It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony with the testimony of the claimant and others in making a determination on the issue of disability. The trier of fact must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.⁴

Both Drs. Stein and Prostic expressed opinions on claimant's permanent functional impairment and both doctors utilized the *AMA Guides* in determining claimant's functional impairment rating.

² Prostic Depo. at 14-15.

³ *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

⁴ *Graff v. Trans World Airlines*, 267 Kan. 854, 983 P.2d 258 (1999).

The ALJ concluded that although Dr. Prostic agreed the *AMA Guides* recommend the DRE model for assessment of permanent impairment, nonetheless the doctor was unable to give a specific citation to support his interpretation and use of the range of motion model. The Board disagrees and notes that Dr. Prostic in the above quoted portion of his testimony cited specific language from the *AMA Guides* that he interpreted to support his use of the range of motion model.

The ALJ further noted that Dr. Prostic provided confusing testimony regarding the rating he provided for claimant's cervical spine. Dr. Prostic testified at one point that he used the range of motion model and later testified that he used the DRE model. The Board agrees that in this regard Dr. Prostic's testimony is not persuasive. Conversely, Dr. Stein, upon his examination of claimant, noted that he did not find any complaints to support a cervical spine impairment rating. As the claimant's complaints were primarily to his low back and right lower extremity, the Board finds claimant did not suffer permanent impairment to his cervical spine.

As previously noted, both physicians utilized the *AMA Guides* in determining claimant's permanent functional impairment to his lumbar spine as required by statute. The Board finds that neither physician misapplied or misinterpreted the *AMA Guides* to a point that their opinions should be disregarded. These two physicians simply disagreed not only as to the interpretation as to how the *AMA Guides* should be applied in different circumstances but they also made different physical findings in regards to claimant's permanent condition as a result of his injuries. Accordingly, the Board concludes it's appropriate to average the ratings provided by the doctors for claimant's lumbar spine which results in finding claimant has suffered a 7.5 percent permanent partial functional impairment.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Bruce E. Moore dated December 22, 2009, is modified to reflect claimant is entitled to compensation for a 7.5 percent permanent partial functional impairment.

Claimant is entitled to 31.13 weeks of permanent partial disability compensation at the rate of \$483 per week or \$15,035.79 for a 7.5 percent functional disability, making a total award of \$15,035.79, which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of April 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael R. Wallace, Attorney for Claimant
Christopher J. Shepard, Attorney for Respondent
Bruce E. Moore, Administrative Law Judge